

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEFFREY L. SMITH,

Defendant.

Case No. 11-cr-40003-JPG

**MEMORANDUM AND ORDER**

This matter comes before the Court on defendant Jeffrey L. Smith's motion (Doc. 29) in which he asks this Court to appoint counsel to file a 28 U.S.C. § 2255 motion and makes arguments that he is entitled to relief pursuant to § 2255. Because Smith has not yet filed a § 2255 motion, his motion to appoint counsel is premature. Accordingly, the Court **DENIES** Smith's motion to the extent it requests the Court appoint counsel (Doc. 29).

The Court believes that Smith intends to file a motion invoking 28 U.S.C. § 2255 by filing the instant motion in his criminal case. However, the Court is hesitant to construe this as a § 2255 motion without a clear indication that Smith intends to invoke that statute. "[T]he court cannot so recharacterize a pro se litigant's motion as the litigant's first § 2255 motion unless the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's 'second or successive' restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing." *Castro v. United States*, 540 U.S. 375, 377 (2003).

The Court **WARNS** Smith that if he does not file a motion to withdraw his pending motion on or before August 30, 2013, the Court will construe it as a § 2255 motion and Smith will then be subject to the second or successive filing requirements contained in 28 U.S.C. § 2255, ¶ 8.

**IT IS SO ORDERED.**

**DATED:** August 1, 2013

s/ J. Phil Gilbert  
**J. PHIL GILBERT**  
**DISTRICT JUDGE**